UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING CORPORATION D/B/A HACIENDA RESORT HOTEL AND CASINO, Respondent, AND SAHARA NEVADA CORPORATION SAHARA HOTEL AND CASINO Respondent, AND LOCAL JOINT EXECUTIVE BOARD LOCAL 226, AND BARTENDERS UNION, LOCAL 165, AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO Union.	)	No. 28-CA-13274 & -13275

INTERVENOR'S MOTION TO STAY

Intervenor Archon Corporation, on behalf of Respondents Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corporation d/b/a Sahara Hotel and Casino, moves to stay the above-referenced matters for the following reasons:

1. On March 5, 2010, the Board issued a Decision and Order in this matter.

2. On June 25, 2019, Compliance Officer Belinda L. Johnson provided a copy of the Decision and Order to the undersigned.

3. On March 11, 2020, Archon Corporation, Intervenor on behalf of Respondents, filed a Motion for Reconsideration in light of the Board's decision in *Valley Hospital Medical*

Center, Inc., 368 NLRB No. 139 (2019). A true and accurate copy of the Motion for Reconsideration is attached hereto as **Exhibit A**.

4. On March 25, 2020, Archon filed its Reply Memorandum in support of its Motion for Reconsideration. A true and accurate copy of the Reply is attached hereto as **Exhibit B**.

5. For the reasons set forth in the Motion for Reconsideration and the Reply in support thereof, which are incorporated herein by reference, Archon requests that these matters be stayed pending the outcome of the Motion for Reconsideration.

Dated: May 14, 2020

Respectfully submitted,

FORD & HARRISON LLP

By:/s/*Stefan H. Black*____
Stephen R. Lueke
Stefan H. Black
Jennifer McGeorge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Intervenor's Motion to Stay was served on the following persons:

via electronic filing:

The Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

via overnight mail:

Richard G. McCracken, Esq. Kimberly C. Weber McCracken, Stemerman & Holsberry, LLP 595 Market Street, Suite 800 San Francisco, CA 94105 Tel: (415) 597-7200 Fax: (415) 597-7201	Cornele A. Overstreet Regional Director National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ Tel: (602) 640-2160 Fax: (602) 640-2178

Dated: May 14, 2020

Esperansa Reinold

WSACTIVELLP:11508090.1

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING CORPORATION D/B/A HACIENDA RESORT HOTEL AND CASINO, Respondent, AND SAHARA NEVADA CORPORATION SAHARA HOTEL AND CASINO Respondent, AND LOCAL JOINT EXECUTIVE BOARD LOCAL 226, AND BARTENDERS UNION, LOCAL 165, AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO Union.	)	No. 28-CA-13274 & -13275 MOTION FOR RECONSIDERATION ARCHON CORPORATION, D/B/A INTERVENOR ON BEHALF OF RESPONDENTS

RESPONDENTS' MOTION FOR RECONSIDERATION

Pursuant to Sections 102.48(c) and 102.24(a) of the National Labor Relations Board ("NLRB" or the "Board") Rules and Regulations, Respondents Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino (the "Hacienda") and Sahara Nevada Corporation d/b/a Sahara Hotel and Casino (the "Sahara") (collectively, the Hacienda and the Sahara will be referred to herein as the "Hotels" or "Respondents") move the Board to reconsider its Decision and Order entered in this case on March 5, 2019 in light of the Board's recent decision in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), finding that an employer's

obligation to check off union dues terminates upon expiration of a collective-bargaining agreement.

I. INTRODUCTION

This case arises from the Hotels' decision to terminate union dues checkoff following the expiration of the collective-bargaining agreements between the Hotels and Local Joint Executive Board Local 226 and Bartenders Union, Local 165 (the "Union"). Despite the fact that the Hotels' decision was consistent with 50 years precedent, the Ninth Circuit Court of Appeals rejected the Board's decision and determined that the Board failed to provide a reasoned explanation to support its ruling. *See Local Joint Exec. Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011) (*"LJEB III"*). Rather than remand the matter back to the Board, the Ninth Circuit addressed the merits of the issue itself and found that in the absence of a union security clause, a dues checkoff provision, standing alone, is akin to any other term of employment that is a mandatory subject of bargaining and that ceasing dues checkoff without bargaining to impasse is thus a violation of Section 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act"). *Id.*

Since then, the Board reaffirmed its past precedent and confirmed that an employer has no obligation under the Act to continue dues checkoff after the contract expired. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *4 ("There is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement."). The opinion addresses the Ninth Circuit's concern that there was no reasonable justification for the past precedent by explaining the rationale behind the Board's long-standing

precedent. Additionally, the Board held that its return to the past standard was to be applied retroactively to all pending cases.[1]

Accordingly, Respondents respectfully request that the Board reconsider its decision finding that Respondents violated Sections 8(a)(5) and (1) of the Act and, pursuant to the rationale set forth in *Valley Hospital*, hold that the Hotels were permitted to cease deducting and remitting to the Union employees' dues upon the expiration of the contract.

II. HISTORY OF THE CASE

A. Factual Background

The Hotels and the Union had collective-bargaining relationships for over thirty years prior to the events leading up to this case. The latest agreements between the Union and the Hotels expired May 31, 1994. After the expiration of the agreements, the parties bargained for several months, but were unsuccessful in reaching successor agreements. Beginning June 7, 1995, the Hotels unilaterally ceased deducting employees' union dues from their paychecks pursuant to Article 3.03 of the collective-bargaining agreements.[2] The Union asserted that such action constituted an unlawful refusal to bargain in violation of Sections 8(a) (5) and (1) of the Act because it was a unilateral change in the terms and conditions of employment, and the parties had not bargained to impasse. The Respondents asserted, and still take the position, that an employer's dues checkoff obligation terminates at the expiration of the contract containing the provision.

[1] The instant cases remain pending with the Board's Region 28 Compliance office.

[2] The collective-bargaining agreements between the Union and the Hotels were identical. Article 3.03 provided: The Check-off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made a part of this Agreement, shall be continued in effect for the term of this agreement. Of particular note, the Hacienda Resort Hotel and Casino was sold in an arm's length transaction on or about August 31, 1995; the Sahara Hotel and Casino was sold in an arm's length transaction on or about October 2, 1995; both were sold in asset sales. It is our understanding that both Hotels' then-existing collective bargaining agreements were assumed by and applied respectively to each successor purchaser entity.

B. Procedural Background

On three separate occasions, the Board ruled that the Hotels did not violate Sections 8(a)(5) and (1) of the Act by terminating union dues checkoff upon expiration of the collective bargaining agreements with the Union. *See Hacienda Hotel Inc. Gaming Corp.*, 331 NLRB 665 (2000) ("*Hacienda I*"); *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB 504 (2007) ("*Hacienda II*"); *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154 (2010) ("*Hacienda III*").

Each time, the Ninth Circuit reversed the Board's decision and remanded the case for further proceedings consistent with the Court's opinion. *Local Jt. Ex. Bd. of Las Vegas v. NLRB ("LJEB I"),* 309 F.3d 578, 580, 586 (2001); *Local Jt. Ex. Bd. of Las Vegas v. NLRB ("LJEB II"),* 540 F.3d 1072, 1082 (2008); *LJEB III*, 657 F.3d at 876.

Following the Ninth Circuit's remand order in *LJEB III*, the Board accepted the Ninth Circuit's decision on the merits as the law of the case and ordered relief based on the finding that the Hotels had violated Section 8(a)(5) and (1). *See Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 363 NLRB No. 7 (2015). However, due to the unique facts of the case, the Board did not issue the standard make-whole relief. *Id.* The Union petitioned the Board's order for review by the Ninth Circuit, and the Ninth Circuit rejected the Board's explanations and ordered the Board to award make-whole relief to the Union. *See Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129, 1138-40 (9th Cir. 2018). The Board accepted the remand and ordered the Hotels to make the Union whole for dues it would have received but for the Respondent's failure to comply with the collective-bargaining agreements. *See Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 367 NLRB No. 7 (2019).

III. BRIEF HISTORY OF DUES CHECKOFF OBLIGATIONS

Other than the instant case, the issue of dues-checkoff obligations has been decided three

times by the Board. In *Bethlehem Steel*, 133 NLRB 1347 (1961), the NLRB unanimously held that an employer may lawfully cease dues deductions upon the expiration of the collective-bargaining agreement. In a Supplemental Decision and Order, the popularly-cited *Bethlehem Steel*, 136 NLRB 1500 (1962), affirmed this decision.

In *WKYC-TV*, 359 NLRB 286 (2012), a split Board reversed *Bethlehem Steel* and held an employer's cessation of dues deductions constituted a unilateral change and violated the Act. The *WKYC* decision was rendered void when the Supreme Court issued its decision in *Noel Canning*, 573 U.S. 513 (2014), finding certain Board appointments constitutionally invalid.

The issue was more recently considered in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). In *Lincoln Lutheran*, a majority of the Board overruled *Bethlehem Steel* and held that an employer's dues check off cessation after expiration of a collective-bargaining agreement constituted a unilateral change and violated the Act. The majority was made up of Chairman Pearce, and Members Hirozawa and McFerran. Members Miscimarra and Johnson dissented. However, the *Lincoln Lutheran* Board further ordered that its ruling be applied only prospectively.

Thereafter, on December 1, 2017, the General Counsel (GC) issued Memorandum GC 18-02, which identified a number of cases where the Office of the General Counsel noted that it would potentially provide the Board with alternative analyses of the identified decisions. The Memo specifically mentioned cases that had overturned precedent and listed *Lincoln Lutheran*. *See* Memorandum GC-02 at page 4.

IV. ARGUMENT

A. *Valley Hospital* Returns the Board to the *Bethlehem Steel* Standard.

The Board first expressly recognized that *Bethlehem Steel* set forth that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement

containing a checkoff provision expires. *See Bethlehem Steel*, 136 NLRB at 1502. As discussed above, this precedent had been in place for decades until a Board majority overruled *Bethlehem Steel* in *Lincoln Lutheran of Racine*. *See Lincoln Lutheran*, 362 NLRB No. 188, at *5-7. However, *Lincoln Lutheran* was short-lived, as the Board recently returned to its long-standing precedent established in *Bethlehem Steel* in *Valley Hospital*.

Notably, Valley Hospital is located in Nevada (as were Respondents). As a "right to work" state, Nevada law prohibits the inclusion of union security clauses in collective bargaining agreements. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *3; 9-11. In *Valley Hospital*, the Board held that an employer's obligation to continue deducting and remitting dues from employees' wages ends when a contract requiring such conduct expires. *Id.*

B. The Board's Decision in *Valley Hospital* Provides a Reasoned Analysis the Return to *Bethlehem Steel* Standard.

In *LJEB III*, the Ninth Circuit rejected the Board's reliance on *Bethlehem Steel* because that case involved a dues checkoff provision where a union security clause was present in the parties' collective bargaining agreement. *LJEB III*, 657 F.3d at 875 ("Where the dues checkoff provisions do not implement union security . . . but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force."). Due to this, the Ninth Circuit held that "nothing in the NLRA . . . limits the duration of a dues checkoff to the duration of a CBA in the absence of union security." *Id.* However, the Ninth Circuit's ruling was never meant to be a definitive interpretation of the law; rather, the Court explicitly stated that "the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA." *Id.* at 876. And the Board has now done just that.

In *Valley Hospital*, the Board addressed the Ninth Circuit's dissatisfaction with the precedent established in *Bethlehem Steel* and the Board's rationale for such rule. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *9-11 ("In the ensuing decades, the Board and courts applied the *Bethlehem Steel* rule without regard to whether a union-security agreement was either present in the contract at issue or lawful in the applicable jurisdiction. The United States Court of Appeals for the Ninth Circuit has been the only court to take issue with the aforementioned precedent."). Accordingly, the Board provided a reasoned explanation. *Id.* at *14 ("The primary policy justification for adherence to the holding in *Bethlehem Steel* for over 50 years has been frequently suggested, but admittedly without full explanation by a Board majority. We provide that explanation here.").

The Board began its explanation for its holding by addressing the *Katz* unilateral change doctrine. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *7-8. In *Katz*, the Board established the rule that an employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without first reaching a lawful impasse. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, the Board has recognized that not all terms and conditions of employment are subject to this rule. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *15-18. Among the exceptions to the *Katz* doctrine, included are: (1) refraining from strikes or lockouts; (2) submitting employee grievances to arbitration; (3) ceding unilateral control over a term of employment to one party; and (4) requiring employees to become union members. *Id.* at *18. Checking off and remitting union dues has historically been included on this list of exceptions. *Id.*

The reason these obligations, and the dues checkoff obligation, have been excluded from the *Katz* doctrine is because they are "rooted in the contract." *Id.* "The uniquely contractual basis

for each of the subjects excepted from the *Katz* unilateral change doctrine has been repeatedly recognized," and "[r]elevant judicial opinions . . . have had no difficulty in defining the dues-checkoff statutory obligation as limited to the existence of a contract containing a checkoff provision." *Id.* (citing *Wilkes Telephone Membership Corp.*, 331 NLRB 823, 823 (2000); *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988); *Office Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 317 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *Sullivan Bros. Printers v. NLRB*, 99 F.3d 1217, 1231 (1st Cir. 1996); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991)). And because these obligations are rooted in the contract, "[w]hen the contract expires, so do both the statutory obligation and the statutory right to enforce it." *Id.* at *18-19. "The status quo reverts to what it was prior to the contract. It is a change de jure, not one effected by a party's unilateral action." *Id.* at *19. The Board held that the employer's action of ceasing dues checkoff did not alter the status quo, and thus did not violate Sections 8(a)(5) and (1) of the Act. *Id.*

Accordingly, the Board reestablished the *Bethlehem Steel* principle that an employer may lawfully cease dues checkoff upon expiration of a contract. *Id.*

C. The Board's Decision in *Valley Hospital* Applies Retroactively to Pending Cases

The Board in *Valley Hospital* specifically held that the reinstatement of the *Bethlehem Steel* standard is to be applied retroactively. The Board will typically apply a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *38 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). After balancing

any possible ill effects resulting from retroactive application with important policy considerations, the Board found that the application of the new standard "in this *and all pending cases* will not work a 'manifest injustice.'" *Id.* [Emphasis added] Accordingly, the Board held that its holding in *Valley Hospital* shall be applied retroactively to any pending cases, which would plainly include the instant matters.[3]

Here, the Board should apply the *Bethlehem Steel* principle that was reestablished in *Valley Hospital* and find that the Hotels did not violate Sections 8(a)(5) and (1) of the Act. Although the Ninth Circuit rejected the Board's then-reliance on *Bethlehem Steel* and ultimately found that Respondents violated Sections 8(a)(5) and (1) of the Act when they ceased dues checkoff, the Board has now adopted a different rule that "…is rational and consistent with the NLRA", in full accord with the Ninth's Circuit's decision in *LJEB III*. Moreover, to the extent that the Board accepted the Ninth Circuit's decision in *LJEB III* as the law of the case, it need not follow that decision now that "controlling authority has since made a contrary decision of law applicable to the issue." *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 24 F. App'x 104, 111 (4th Cir. 2011); *see also EEOC v. International Longshoremen's Assoc.*, 622 F.2d 1054, 1058 (5th Cir. 1980); *Toussaint v. McCarthy*, 801 F.2d 1080, 1092 n. 11 (9th Cir. 1986).

The Board has since ruled on the exact issue in this case. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *38. In doing so, it set forth its rationale for reestablishing the *Bethlehem Steel* principle and stated that its decision should be applied retroactively. *Id.* at *14-38. Accordingly, the Board should reconsider its previous decision in the instant matters and apply the longstanding precedent that was reestablished in *Valley Hospital*.

[3] Indeed, given the decades-old alleged violations as well as the similar passage of time following sale of the Hotels, it is respectfully submitted that imposition of the Ninth Circuit's ruling in *LJEB III* would in fact work a "manifest injustice".

V. CONCLUSION

For the reasons set forth above, the Board should reconsider its Order entered March 5, 2019 and find that Respondents did not violate Sections 8(a)(5) and (1) Act when they ceased dues checkoffs after the expiration of collective-bargaining agreements, or in the alternative, issue an Order to Show Cause as to why this Motion should not be granted.

Dated: March 11, 2020

Respectfully submitted,

FORD & HARRISON LLP

By:/s/Stephen R. Lueke____
Stephen R. Lueke
Stefan H. Black
Courtney E. Majors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Archon Corporation, Intervenor on behalf of Respondents Motion for Reconsideration was filed or served on the following persons:

via electronic filing:

The Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

via overnight mail and telephonically notified of electronic filing :

Richard G. McCracken, Esq. Kimberly C. Weber McCracken, Stemerman & Holsberry, LLP 595 Market Street, Suite 800 San Francisco, CA 94105 Tel: (415) 597-7200 Fax: (415) 597-7201	Cornele A. Overstreet Regional Director National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ Tel: (602) 640-2160 Fax: (602) 640-2178

Dated: March 11, 2020

Esperansa Reinold

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Submitted E-File To Office: Office of Executive Secretary

Case Number: 28-CA-013274

Case Name: Hacienda Hotel & Casino

Filing Party: Charged Party / Respondent

Contact Information:

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Attached Documents:

Motion for Reconsideration:NLRB Motion for Reconsideration.pdf

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EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING CORPORATION D/B/A HACIENDA RESORT HOTEL AND CASINO, Respondent, AND SAHARA NEVADA CORPORATION SAHARA HOTEL AND CASINO Respondent, AND LOCAL JOINT EXECUTIVE BOARD LOCAL 226, AND BARTENDERS UNION, LOCAL 165, AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO Union.	)	No. 28-CA-13274 & -13275 REPLY TO CHARGING PARTY'S OPPOSITION TO MOTION FOR RECONSIDERATION BY ARCHON CORPORATION, D/B/A INTERVENOR ON BEHALF OF RESPONDENTS

REPLY TO CHARGING PARTY'S OPPOSITION TO RESPONDENTS'

MOTION FOR RECONSIDERATION

I. INTRODUCTION

In its opposition, Charging Party, Local Joint Executive Board Local 226, and Bartenders Union Local 165, Affiliated With Hotel Employees and Restaurant Employees, AFL-CIO ("Charging Party"), has provided no valid basis supporting its contention that the Board should deny the motion for reconsideration filed by Respondents Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino (the "Hacienda") and Sahara Nevada

Corporation d/b/a Sahara Hotel and Casino (the "Sahara") (hereinafter collectively referred to as "Hotels" or "Respondents"). Rather than addressing the merits of the motion, Charging Party submitted a less than two-page opposition focused entirely on procedural arguments, and which is nearly barren of citation to any legal authority. In sum, Charging Party suggests that the Board does not have the power to entertain Respondents' motion for various procedural reasons. Moreover, without citing any authority, and despite the fact that this Action has yet to conclude, Charging Party contends this matter is not "pending" as a purported basis to avoid the clear applicability of the Board's recent decision in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019) ("*Valley Hospital*"). However, as explained below, ample authority supports Respondents' contention that this Action is indeed pending, and that the Board has the discretion and ability to reverse its March 19, 2019 decision in this Action.

Tellingly, Charging Party does not bother to address Respondents' motion on the merits. The likely reason is because the Board's decision in *Valley Hospital* — finding that an employer's obligation to check off union dues terminates upon expiration of a collective-bargaining agreement — has irrefutable impact on this case. Moreover, because the Board applied its decision in *Valley Hospital* retroactively to ***all pending cases***, the decision necessarily compels the fair and equitable reversal of the Board's March 19, 2019 decision in this Action.

Accordingly, for the reasons explained in Respondents' moving papers and herein, Respondents respectfully request that the Board reconsider its March 19, 2019 decision finding that Respondents violated Sections 8(a)(5) and (1) of the Act and, pursuant to the rationale set forth in *Valley Hospital*, hold that the Hotels were permitted to cease deducting and remitting to the Union employees' dues upon the expiration of the contract.

/ / /

II. ARGUMENT

A. The Board Has Discretion to Hear and Decide a Motion for Reconsideration Filed Within "Such Further Period as the Board May Allow."

Charging Party suggests the Board is bound by an inflexible rule mandating denial of Respondents' motion on grounds of untimeliness. *See* Charging Party's Opposition, at p. 2. However, the plain language of the regulation cited by Charging Party in support of its argument specifies that a motion for reconsideration "must be filed within 28 days, ***or such further period as the Board may allow***, after the service of the Board's decision or order. . ." 29 C.F.R. §102.48(c)(2) (emphasis added). Thus, the Board may utilize its discretion to hear a motion for reconsideration filed beyond the 28-day period. *See Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 509 (5th Cir. 2002) (explaining that there is "no merit" to contention that NLRB erred in granting a motion filed beyond the 28-day deadline because "the NLRB can, at its discretion, disregard the 28 day deadline"); *NLRB v. Usa Polymer Corp*., 272 F.3d 289, 296 (5th Cir. 2001) ("[W]e agree with the Sixth Circuit that section 102.48 grants the NLRB discretion to entertain motions . . . after the twenty-eight day period has expired."). The Board's exercise of its discretion is particularly appropriate under circumstances where, as here, the basis for reconsideration is predicated on a later-issued Board decision with express retroactive effect on pending cases.

As explained in Respondents' moving papers, Respondents seek reconsideration of the Board's March 5, 2019 decision in this Action as result of the Board's December 2019 decision in *Valley Hospital, supra*, 368 NLRB No. 139. In *Valley Hospital*, the Board explicitly discusses this Action at length, including the prior decisions made by the Board and the Court of Appeals, explicitly noting that this pending Action is the "single case" where a court has taken issue with the Board's longstanding standard set forth in *Bethlehem Steel*, 133 NLRB 1347 (1961)

("*Bethlehem Steel*"). *See Valley Hospital, supra,* 368 NLRB No. 139 at *9-*13. As explained in Respondents' moving papers, the Board has now established a new rule with retroactive application to ***all pending cases***.

Against this backdrop, Respondents' motion for reconsideration is appropriate, despite having been filed beyond 28-day period set forth in 29 C.F.R. §102.48(c)(2). In fact, absent the Board's exercise of its discretion to hear Respondents' motion, the Board's intention that *Valley Hospital* be retroactively applied to all pending cases will be frustrated; and this Action will be the *sole* pending case subject to a legal standard that differs from the longstanding Board precedent set forth in *Bethlehem Steel*. Respondents therefore respectfully urge the Board to exercise its discretion to hear and decide Respondents' motion for reconsideration, based on the unique circumstances presented in this Action.

B. *Valley Hospital* Applies Retroactively to All Pending Cases, Including the Instant Action.

The Board's decision in *Valley Hospital* explicitly states that it applies retroactively to all pending cases. *See Valley Hospital, supra,* 368 NLRB No. 139 at *3. A simple review of the Board's docket in the instant action reveals that it is described as an "open" (i.e., "pending") case. Yet, Charging Party attempts to avoid the unmistakable impact of *Valley Hospital* by arguing that the "merits decision" in this case is no longer "pending," and *Valley Hospital* therefore is inapplicable. *See* Charging Party's Opposition, at p. 2.

Nothing in *Valley Hospital* limits the definition of "pending" in the manner suggested by Charging Party, nor is Charging Party's position consistent with Board precedent. Indeed, "[t]he Board's usual practice is to apply new policies and standards retroactively "to all pending cases ***in whatever stage***." *SNE Enterprises,* 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture*

Co., 121 NLRB 995, 1006-1007 (1958) [emphasis added]); *see also King Soopers, Inc.*, 364 NLRB No. 93 (2016); 2016 NLRB LEXIS 625 at *37; *Pressroom Cleaners*, 361 NLRB 643, 648 (2014); *Aramark School Services*, 337 NLRB 1063, fn. 1 (2002). Furthermore, while no compliance proceeding has yet occurred in this Action to date, the Board has previously applied new policy decisions retroactively, including those in the compliance phase. *See, e.g., Tortillas Don Chavas*, 361 NLRB 101, 104 and fn. 22 (2014) ("We shall apply this policy to all pending cases in whatever stage, including compliance."). For these reasons, the Board's decision in *Valley Hospital* undeniably applies to this pending case, and Charging Party's contention otherwise must be rejected.

C. Failure to Apply the Holding in *Valley Hospital* to this Pending Action Would Result in Manifest Injustice to Respondents.

As explained in *Valley Hospital*, the Board typically applies a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" *Valley Hospital*, *supra*, 368 NLRB No. 139, at *38 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). Moreover, [i]n determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *Id*. In *Valley Hospital*, the Board explicitly found that "any ill effects resulting from retroactive application of the legal standard we reinstate today do not outweigh the important policy considerations we rely on in reinstating the *Bethlehem Steel* standard that has defined statutory obligations and shaped collective-bargaining practices for all but a few recent years since 1962." *Id.* Accordingly, the Board found that the application of the new standard "in this ***and all pending cases*** will not work

a 'manifest injustice.'" *Id.* (emphasis added).

Indeed, Respondents submit that "manifest injustice" would result if imposition of the Ninth Circuit's ruling in *Local Joint Exec. Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011) (*"LJEB III"*) is applied to this pending Action, as opposed to the Board's retroactive holding in *Valley Hospital*, returning to the *Bethlehem Steel* standard. As the Board noted in *Valley Hospital*, the Ninth Circuit has been the only court to take issue with the *Bethlehem Steel* precedent, and it has done so "in the protracted litigation of [this] single case," finding that "the Board had failed to provide a reasoned explanation for holding that an employer's post-expiration dues-checkoff obligation in right-to-work states was not subject to that doctrine." *Valley Hospital*, *supra*, 368 NLRB No. 139, at *9-10. However, the Board has now provided that explanation, and has adopted a different and retroactive rule that "…is rational and consistent with the NLRA," in full accord with the Ninth's Circuit's decision in *LJEB III*. *Id.* at *14-*39; fn. 9 ("We acknowledge, as did former Members Schaumber and Hayes in their concurring opinion in *Hacienda III*, 355 NLRB at 745, that the Board may have failed to adequately explain the rationale for the holding in *Bethlehem Steel*, particularly as to its application in cases where there is no companion union-security provision. We disagree, however, with our dissenting colleague's implication that a prior failure by the Board to adequately explain the rationale could somehow preclude us from providing an explanation now. The Ninth Circuit clearly did not think so when it declared in *LJEB III* that the law of the circuit doctrine would not apply to its holding there and that "the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA. 657 F.3d at 876.").

Here, the Board should apply the *Bethlehem Steel* principle that was reestablished in *Valley Hospital* and find that the Hotels did not violate Sections 8(a)(5) and (1) of the Act, particularly

given the decades-old alleged violations as well as the similar passage of time following sale of the Hotels.

D. <u>The Law of the Case Doctrine Does Not Bar the Board From Reconsidering its March 5, 2019 Decision</u>.

Charging Party further contends that the "law of the case" doctrine somehow bars the Board from granting Respondents' motion. *See* Charging Party's Opposition, at p. 2. Specifically, Charging Party argues that if the Board changes the decision in this matter based on *Valley Hospital*, such a ruling "would conflict with the law of the case that the Board accepted on remand from the Ninth Circuit." *Id.* Charging Party, however, confuses the "law of the case" doctrine with principles of *res judicata*.

The United States Supreme Court has explained the distinction: "[A] prior ruling may have been followed as the law of the case but there is a difference between such adherence and res judicata; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." *Southern R. Co. v. Clift*, 260 U.S. 316, 319-320 (1922) (citing *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 99 (1905); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)).

Likewise, the Board has recognized its own power and discretion to reconsider its decisions, despite having adopted a prior ruling as "law of the case":

> [A]s stated in *Arizona v. California*, 460 U.S. 605, 618 (1983), "[u]nlike the more precise requirements of res judicata, law of the case is an amorphous concept"—it "directs a court's discretion, it does not limit the tribunal's power." Thus, as we recently stated in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 82 (2007): "***Although the law of the case doctrine does not absolutely preclude reconsideration or reversal of a prior decision***, such action should not be taken absent extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice" (internal quotations omitted).

D.L. Baker, Inc., 351 NLRB 515, 528 (2007) (emphasis added). Indeed, the Board has a longstanding practice of applying a "nonacquiescence policy" to appellate decisions contrary to Board law, and "instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court." *Id*. at 529 fn. 42 (citations omitted); *Valley Hospital, supra,* 368 NLRB No. 139 at fn. 16.

Additionally, as noted in Respondents' moving papers, to the extent the Board accepted the Ninth Circuit's decision in *LJEB III* as the law of the case, the Board need not follow that decision now that "controlling authority has since made a contrary decision of law applicable to the issue." *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 24 F. App'x 104, 111 (4th Cir. 2011); *see also EEOC v. International Longshoremen's Assoc.*, 622 F.2d 1054, 1058 (5th Cir. 1980); *Toussaint v. McCarthy*, 801 F.2d 1080, 1092 n. 11 (9th Cir. 1986). Thus, contrary to Charging Party's contention, the Board has the right and the power to reconsider its prior decisions, even if it adopted a prior ruling as "law of the case."

Valley Hospital is subsequent controlling authority that is directly on point to the precise issue raised in this Action. *See Valley Hospital, supra,* 368 NLRB No. 139 at *38. In *Valley Hospital*, the Board explained its rationale for reestablishing the *Bethlehem Steel* standard and stated that its decision should be applied retroactively to all pending cases. *Id.* at *14-*38. Thus, the Board should reconsider its March 5, 2019 decision in the instant Action and apply the longstanding precedent that was reestablished in *Valley Hospital*.

III. CONCLUSION

For the reasons set forth above, and in Respondents' moving papers, the Board should reconsider its Order entered March 5, 2019 and find that Respondents did not violate Sections 8(a)(5) and (1) Act when they ceased dues checkoffs after the expiration of collective-bargaining

agreements, or in the alternative, issue an Order to Show Cause as to why this Motion should not be granted.

Dated: March 25, 2020

Respectfully submitted,

FORD & HARRISON LLP

By:/s/Stephen R. Lueke____
Stephen R. Lueke
Stefan H. Black
Courtney E. Majors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Reply to Charging Party's Opposition to Motion for Reconsideration by Archon Corp, D/B/A Intervenor on behalf of Respondents was served on the following persons:

via electronic filing:

The Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

via overnight mail and telephonically notified of electronic filing :

Richard G. McCracken, Esq. Kimberly C. Weber McCracken, Stemerman & Holsberry, LLP 595 Market Street, Suite 800 San Francisco, CA 94105 Tel: (415) 597-7200 Fax: (415) 597-7201	Cornele A. Overstreet Regional Director National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ Tel: (602) 640-2160 Fax: (602) 640-2178

Dated: March 25, 2020

Curfew Wilson

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Case Name: Hacienda Hotel & Casino

Filing Party: Charged Party / Respondent

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